



DATE ISSUED: May 31, 1989  
CASE NO: 88-INA-347

IN THE MATTER OF THE APPLICATION  
FOR AN ALIEN EMPLOYMENT CERTIFI-  
CATION UNDER THE IMMIGRATION AND  
NATIONALITY ACT

AL-GHAZALI SCHOOL  
Employer

on behalf of

SAFAA AL NEKLAWI  
Alien

Stanley A. Cohen, Esq.  
Lynn Neugebauer, Esq.  
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; Brenner,  
Guill, Tureck, and Williams, Administrative Law Judges.

NAHUM LITT  
Chief Judge:

DECISION AND ORDER

This matter arises from an application for labor certification which the Employer submitted on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (1982). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26 (1988).<sup>1</sup>

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that there are not sufficient workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the

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<sup>1</sup> All regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

alien is to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must apply for labor certification pursuant to §656.21. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in the Appeal File (A1-A70), and any written arguments of the parties. See §656.27(c).

### Statement of the Case

On July 16, 1986, the Employer filed an application for alien labor certification to enable the Alien to fill the position of Teacher of English and Islamic Studies. (A6). The Employer is located in Jersey City, New Jersey, and operates a school which teaches Arabic to English speaking students and English to non-English speaking students. The requirements for the position included a Bachelors' Degree and a Masters' Degree in English. (A6). The Employer also required fluency in Arabic and previous study of the Arabic language and Islamic religion. (A6).

On March 9, 1988, the CO issued a Notice of Findings. (A40). According to the CO, the requirements are unduly restrictive in violation of §656.21(b)(2). The CO required the Employer to clarify what education, training, and experience would be qualifying; to document why course study in Islamic religion is needed to perform the job duties; and to document that the Arabic language requirement arises from business necessity. (A40-A39). The CO then required the Employer to document that the Alien meets the minimum qualifications for the position under §656.21(b)(6). According to the CO, since the Employer has not required training and experience beyond the educational requirements, the Employer must "submit documentation showing efforts to locate and employ U.S. workers through college/universities." Finally, the CO stated that U.S. workers were rejected for other than lawful, job-related reasons in violation of §656.21(b)(7), and that the job was not clearly open to any qualified U.S. worker under §656.20(c)(8). According to the CO, three U.S. workers were qualified for the position, but were rejected. The Employer was required to document the lawful, job-related reasons for not hiring the U.S. applicants. (A38).

On March 31, 1988, the Employer filed its rebuttal. (A42). The Employer offered to drop the requirement of course study of Islamic religion, and stated that the requirements for the position include a B.A. in education with a major in education, plus one year experience in the job offered; however, in lieu of the experience, the Employer will accept a M.A in education or linguistics. (A56). The Employer also stated that the Arabic language requirement was necessary to teach the students. (A56). According to the Employer, two of the U.S. applicants were rejected as having poor English skills; the third applicant, Mr. Gaby Jeryes, was rejected for not

submitting a transcript and verification of employment. (A55). The Employer then stated a willingness to readvertise. (A55). The documents submitted in rebuttal also indicate that letters were sent to six New York area colleges and universities requesting referrals of qualified students. (A49-A44).

On April 29, 1988, the CO issued a Final Determination denying labor certification. (A59). Although the CO accepted the Employer's reasons for rejecting two of the U.S. applicants, the CO found that Mr. Gaby Jeryes was rejected for other than lawful, job-related reasons. According to the CO, Mr. Jeryes indicated that he was discriminated against because he did not belong to the religion of Islam. (A59).<sup>2</sup> The CO also found that the Employer's recruitment efforts were insufficient. The CO stated that "[w]e also note employer's evidence of college recruitment as required by 20 C.F.R. 656.21(b)(4) but employer failed to furnish a written response stating the results of this recruitment including the names and qualifications of those referred or stating that no referrals were or could be made." (A58).

In a May 11, 1988, letter to the file, the CO stated that "although we might have accepted employer's reason for rejection of U.S. worker, Gary Jeryes, it still appears that availability might have existed and labor market was not adequately tested." (A60). According to the letter, the denial was based on a "failure to adequately recruit for U.S. workers at colleges/universities, as required in our Notice of Findings. . . . Employer's rebuttal letter of March 30, 1988 did not address this issue at all. He only attached photostatic copies of letters sent to (6) colleges/universities but no results of same were submitted or mentioned in his rebuttal or appeal letters." (A60).

The Employer requested review. (A70). In its brief on appeal, the Employer stated that it contacted six local colleges and universities, and that no referrals were made by any placement offices. The Employer submitted a letter from the principal of the school, dated August, 1988, stating that there were no responses to its college recruitment efforts.

### Discussion and Conclusion

The denial of labor certification was based, in part, on the ground that U.S. applicant, Gary Jeryes, was rejected for other than lawful, job-related reasons, in violation of §656.21(b)(7). The Employer in rebuttal to the Notice of Findings, stated that the applicant was rejected for failure to provide a transcript and verification of previous employment. An Employer may lawfully reject U.S. workers who do not respond to reasonable requests for verification of employment history and educational credentials. In re Sunee Kim's Enterprises, 87 INA 713 (Jul. 22, 1988). Accordingly, the denial of labor certification cannot be affirmed on this ground. Moreover, the CO's letter to the file indicates that she may have accepted the Employer's rebuttal on this issue and that the denial was based on the Employer's inadequate recruitment efforts.

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<sup>2</sup> Based on a questionnaire, sent to the U.S. applicant by the State employment service, dated August 18, 1987. (A32). The statement is unsigned.

Under §656.21(b)(4), the employer shall document that its other efforts to locate and employ U.S. workers, such as colleges and universities, have been and continue to be unsuccessful. In the Notice of Findings, dated March 9, 1988, the CO required the Employer to submit documentation showing efforts to locate and employ U.S. workers through colleges and universities. In its rebuttal of March 31, 1988, the Employer submitted copies of letters to six colleges and universities in the area. In the Final Determination, the CO considered the response insufficient, because the Employer did not include a statement of the results of the recruitment efforts, whether any referrals had been or could be made. On appeal, the Employer submitted a statement that no referrals were made as a result of its efforts; however, since such evidence was not in the record upon which the denial of certification was based, it cannot be considered on appeal. §656.26(b)(4); §656.27(c); In re University of Texas at San Antonio, 88 INA 71 (May 9, 1988).

According to the CO, the Employer's recruitment efforts were inadequate because it did not include a statement of the results of such efforts. The CO required the Employer to submit documentation showing efforts to locate and employ U.S. workers through colleges and universities. In rebuttal, the Employer submitted its efforts, to wit, letters to six area colleges and universities. The Employer made efforts to locate and recruit U.S. workers through colleges and universities. Such efforts were begun after issuance of the Notice of Findings, during the period of time allowed for rebuttal; however, recruitment would not have yielded referrals from colleges and universities prior to the end of the rebuttal period. Since the Employer made efforts to locate and employ U.S. workers through colleges and universities in response to and as instructed by the Notice of Findings, denial of certification cannot be affirmed on the grounds of the Employer's failure on rebuttal.

The dispute with regard to the minimum qualifications for the position has been resolved on rebuttal, and pursuant to the instructions in the Notice of Findings, the Employer expressed a willingness to readvertise. Therefore, this matter should be remanded to provide the Employer an opportunity to adequately test the American labor market, using the modified requirements, both through advertisement and college/university recruitment, and to document its results.

#### ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby VACATED, and the matter is REMANDED for further action consistent with this opinion.

NAHUM LITT  
Chief Administrative Law Judge

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